

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

BROADCAST MUSIC, INC.; RICK  
SPRINGFIELD MUSIC; WARNER-  
TAMERLANE PUBLISHING CORP.;  
ELEKSYLUM MUSIC, INC.; NO  
SURRENDER MUSIC; CYANIDE  
PUBLISHING; BMG RIGHTS  
MANAGEMENT US LLC d/b/a MUSIC OF  
EVERPOP,

Plaintiffs,

v.

DR. LIVINGSTON'S INC d/b/a TAVERN  
618, NICHOLAS N. PETERSON AND  
MICHAEL E. ZDUNSKI,

Defendants.

CIVIL ACTION NO.: 1:24-cv-00190-CB

**MEMORANDUM IN SUPPORT OF MOTION FOR DEFAULT JUDGMENT**

Plaintiffs filed the Complaint in this action on July 2, 2024. In compliance with Fed. R. Civ. P. 4(c), Defendants Dr. Livingston's Inc., Nicholas N. Peterson and Michael E. Zdunski were served with a copy of the Summons, Complaint, and Mandatory Disclosures on July 10, 2024. Copies of the Affidavits of Service, which have been filed with the Court, are attached as Exhibit A collectively.

Pursuant to Fed. R. Civ. P. 12(a)(1)(A), Defendants Dr. Livingston's Inc., Nicholas N. Peterson and Michael E. Zdunski were required to file and serve its Answer on Plaintiffs no later than July 31, 2024. To date, no responsive pleading has been filed or served.

Plaintiff Broadcast Music, Inc. ("BMI") is a "performing rights society" which licenses the right to publicly perform a repertoire of 22.4 million copyrighted musical compositions works on behalf of the copyright owners of these works. See 17 U.S.C. § 101. The other Plaintiffs are the copyright owners of the three individual compositions which are the subject of this lawsuit from whom BMI has acquired the non-exclusive public performance rights. Declaration of Anthony Adewumi, Attorney ("Adewumi Declaration"), ¶¶ 2, 3.

BMI, in turn, grants to music users such as broadcasters and the owners and operators of concert halls, restaurants, nightclubs and hotels, the right to publicly perform any of the works in BMI's repertoire by means of "blanket license agreements". Adewumi Declaration, ¶ 2. These agreements have been recognized as the most efficient means to exploit copyright owners' public performance rights.

The Defendants, Dr. Livingston's Inc., Nicholas N. Peterson and Michael E. Zdunski, each individually, (collectively "Defendants") own and operate Tavern 618 located at 12271 State Highway 618 Conneaut Lake, Pennsylvania 16316, which regularly features performances of live and recorded music. Declaration of John "Jack" Flynn, Assistant Vice President, Licensing ("Flynn Declaration"), ¶ [corresponding paragraph].

Between June 2023 and April 2024, BMI repeatedly informed the Defendants of the need to obtain permission for public performances of copyrighted music. BMI offered to enter into a blanket license agreement with the Defendants, but the Defendants did not do so. Flynn Declaration, ¶¶ 3, 5, 6, 8, and 9.

BMI's records indicate that BMI licensing personnel telephoned the Defendants on 27 occasions and sent several letters. Flynn Declaration ¶¶ 3-8.

The Complaint seeks an injunction, statutory damages, the costs of this action, and reasonable attorneys' fees for copyright infringement. In light of Defendants' default, Plaintiffs request judgment awarding each of these forms of relief. Liability for copyright infringement is established where the defendant defaults as "the facts alleged in the pleadings are assumed to be true." Broad. Music, Inc. v. DeGallo, Inc., 872 F. Supp. 167, 168 (D.N.J. 1995); See also, Broad. Music, Inc. v. R Bar of Manhattan, Inc., 919 F. Supp. 656 (S.D.N.Y. 1996).

Within the limits of \$750 and \$30,000 per infringement, the amount of any statutory damages award is within the discretion of this Court. 17 U.S.C. §504(c) (1999). For the four (4) acts of infringement described in the Complaint, Plaintiffs request a reasonable total award of \$16,000.00. This constitutes an award of \$4,000.00 for each of the four (4) infringements, a figure that is approximately three times the amount Plaintiffs would have received in licensing fees from Defendants to date had their establishment properly been licensed. (*See* Flynn Declaration ¶ 15.)

Courts consistently have held that a statutory damages award between two and three times the amount of licensing fees that the plaintiff would have received in licensing fees is appropriate under Section 504(c). See Chi-Boy Music v. Charlie Club, Inc., 930 F.2d 1224, 1229-30 (7<sup>th</sup> Cir. 1991); Broadcast Music, Inc. v. DeGallo, Inc., 872 F. Supp 167, 169 (N.J. 1995); Rodgers v. Eighty Four Lumber Co., 623 F. Supp. 889, 892 (W.D. Pa. 1985). Dream Dealers Music v. Parker, 924 F. Supp. 1146, 1153 (S.D. Ga. 1994) (awarding three times what defendant would have paid ASCAP to be licensed). See also Sailor Music v. IML Corp., 867 F. Supp. 565, 570 (E.D. Mich. 1994) (reviewing "a survey of statutory awards throughout the country, all of which indicate that the courts typically award three times the amount of a properly purchased license for each infringement").

Courts considering awards of statutory damages have recognized that awards in the range of \$3,000-\$5,000 per infringement or higher are appropriate in cases where the infringement resulted from deliberate indifference toward copyright laws. See Divine Mill Music v. Blackmon's Inc., 2008 U.S. Dist. LEXIS 89755 (S.D. Ill. 2008) ( awarding “\$ 7,000 per work infringed, for a total principal amount of \$ 42,000”); Dream Dealers, 924 F.Supp. at 1153 (awarding \$5,000 per violation); Broadcast Music, Inc. v. Entertainment Complex, Inc., 198 F. Supp. 2d 1291 (N.D. Ala. 2002) (awarding \$3,909.09 for each of 11 copyright violations).

Therefore, Plaintiffs request is a modest, just, and appropriate statutory damages award.

In any civil action such as this one under the Copyright Act, costs and attorneys’ fees are recoverable under 17 U.S.C. § 505. Accordingly, under this provision, the courts have allowed full recovery by the prevailing party of its reasonable costs. See Milene Music, Inc. v. Gotauco, 551 F. Supp. 1288, 1297 (D.R.I. 1982). In addition to statutory damages, Plaintiffs request an award of costs and reasonable attorneys’ fees pursuant to 17 U.S.C. § 505. To date, Plaintiffs have incurred attorneys’ fees and costs in the amount of \$4,457.50. See Affidavit of Jonathan S. McAnney (attached hereto as Exhibit B). This amount represents a reasonable fee in light of the experience of counsel, the nature of the case, and the services provided. See id Because no responsive pleading was filed within the time provided by the Rules and by the Court’s Order, pursuant to Federal Rule of Civil Procedure 55(b), Plaintiffs respectfully move this Court for entry of default judgment ordering that:

- (a) Defendants [names of defendants], their agents, servants, employees, and all persons acting under their permission and authority, be enjoined and restraining from infringing, in any manner, the copyrighted musical compositions licensed by BMI, pursuant to 17 U.S.C. § 502;

- (b) Defendants Dr. Livingston's Inc., Nicholas N. Peterson and Michael E. Zdunski pay statutory damages in the amount of \$16,000.00, which represents an award of \$4,000.00 for each of the four (4) acts of infringement, pursuant to 17 U.S.C. § 504(c);
- (c) Defendants Dr. Livingston's Inc., Nicholas N. Peterson and Michael E. Zdunski pay plaintiffs' costs, including reasonable attorneys' fees and costs in the amount of \$4,457.50, pursuant to 17 U.S.C. § 505;
- (d) Defendants Dr. Livingston's Inc., Nicholas N. Peterson and Michael E. Zdunski pay interest on these awards pursuant to 28 U.S.C. § 1961.

Respectfully submitted,

**TUCKER ARENSBERG, P.C.**

Dated: 9-5, 2024

By: /s/Jonathan S. McAnney  
Jonathan S. McAnney  
Pa. I.D. #50041  
One PPG Place, Suite 1500  
Pittsburgh, PA 15222  
(412) 594-5584  
jmcannery@tuckerlaw.com

*Attorney(s) for Plaintiffs*

TADMS:20530443-1 005068-202332

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CIVIL ACTION NO. 1:24-cv-00190

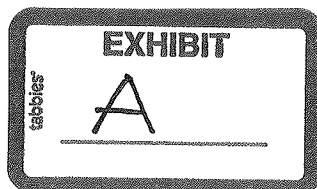
RETURN OF SERVICE

I hereby certify and return that on the 10<sup>th</sup> day of July, 2024, at 5:23  
a.m./p.m. I served the Complaint, Civil Cover Sheet and Summons upon Defendant Dr. Livingston's  
Inc d/b/a Tavern 618 as follows:

Chris Crain - Bartender (Fm)  
Name of Individual Served and Position/Title

Dr. Livingston's Inc d/b/a Tavern 618  
Name of Defendant Served

12271 State Highway 618 Conneaut Lake PA 16316  
Address Where Service Was Made



I incurred the following costs in service: .....

I DECLARE UNDER PENALTY OF  
PERJURY THAT THE FOREGOING IS  
TRUE AND CORRECT.

By   
Signature of Process Server

Michael P. Fuller  
Typed or Printed Name of Process Server

308 Jefferson ST. Meadville PA 16335  
Typed or Printed Address of Process Server

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Defendants.

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RETURN OF SERVICE

I hereby certify and return that on the 10<sup>th</sup> day of July, 2024, at 4:29  
a.m./p.m. I served the Complaint, Civil Cover Sheet and Summons upon Defendant Nicholas N.  
Peterson as follows:

Nicholas Peterson  
Name of Individual Served and Position/Title

Nicholas Peterson  
Name of Defendant Served

1825 Peninsula Drive Erie PA 16505  
Address Where Service Was Made



I incurred the following costs in service: \_\_\_\_\_

I DECLARE UNDER PENALTY OF  
PERJURY THAT THE FOREGOING IS  
TRUE AND CORRECT.

By   
Signature of Process Server

Michael P. Fuller  
Typed or Printed Name of Process Server

308 Jefferson ST. Meadville PA  
Typed or Printed Address of Process Server 16335

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Defendants.

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RETURN OF SERVICE

I hereby certify and return that on the 10<sup>th</sup> day of July, 2024, at 5:23  
a.m./p.m. (p.m.) I served the Complaint, Civil Cover Sheet and Summons upon Defendant Michael E.  
Zdunski as follows:

Chris Crain - Bartender (FM)

Name of Individual Served and Position/Title

Michael F. Zdunski

Name of Defendant Served

12271 State Highway 618, Conneaut Lake PA 16316  
Address Where Service Was Made

I incurred the following costs in service: \_\_\_\_\_

I DECLARE UNDER PENALTY OF  
PERJURY THAT THE FOREGOING IS  
TRUE AND CORRECT.

By   
Signature of Process Server

Michael P. Fuller  
Typed or Printed Name of Process Server

308 Jefferson ST. Meadville PA 16335  
Typed or Printed Address of Process Server

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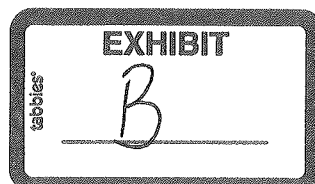
Defendants.

**AFFIDAVIT OF LEGAL FEES AND COSTS BY JONATHAN S. McANNEY**

COMMONWEALTH OF PENNSYLVANIA )  
 )  
COUNTY OF ALLEGHENY )

Jonathan S. McAnney, Esquire upon his oath deposes and says:

1. I am a shareholder in the law firm of Tucker Arensberg, P.C. I am counsel for the Plaintiffs, Broadcast Music, Inc., et al. (hereinafter referred to as "BMI").
2. I have been representing BMI and handling cases for them for over thirty five (35) years.
3. This case was assigned to my law firm in June 2024.



4. Upon receipt of the case from BMI, I reviewed the investigation file consisting of the logger's notes, infringement data sheets, the correspondence with the Defendants, and the phone logs maintained by BMI. I also reviewed the Complaint which had been forwarded to me by BMI.

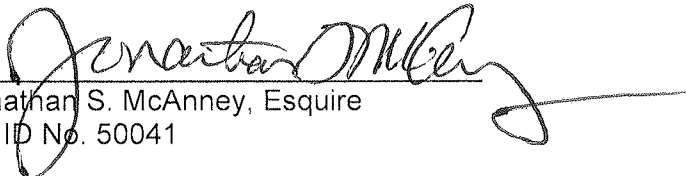
5. From June 2024 through the present, I have been the only attorney handling this case.

6. My hourly rate in 2024 is \$440 per hour. These hourly rates are fair and reasonable for an attorney of my age and experience (I am a 1987 graduate of Syracuse University School of Law).


7. I have been practicing law since 1987 and am admitted to practice in the Commonwealth of Pennsylvania, as well as the United States District Court for the Western District of Pennsylvania.

8. Total legal services and costs incurred on the case have been as follows:

<u>Fees</u>	<u>Costs</u>	<u>Total</u>
\$3,700.00	\$757.50	\$4,457.50

  
Jonathan S. McAnney, Esquire  
PA ID No. 50041

Sworn to and subscribed before me  
on this 5<sup>th</sup> day of September, 2024:

  
\_\_\_\_\_  
Notary Public

TADMS:20530483-1:005068-202332

